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IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

DOCKET NO. 76-1226

DANIEL SICILIANO, VICTOR ECHAVARRY, JR., and DANIEL GIBSON,

Appellants,

against

THE STATE OF NEW YORK,

Appellee.

ON APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

APPELLANTS' RESPONSE TO MOTION TO DISMISS OR AFFIRM

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APPELLANTS' RESPONSE TO MOTION TO DISMISS OR AFFIRM

Appellants submit this brief in response to the State's motion to dismiss this direct appeal or to affirm the final judgment and order of the New York Court of Appeals.

I.

The State's "Waiver" Argument.

The State asserts that the Court of Appeals held that appellants' Equal Protection and Due Process challenge to the statutory exclusion of all of appellants' peers from all grand jury service was "foreclosed [from] further inquiry" because appellants entered guilty pleas (Appellee Br. 9). The Court of Appeals made no such ruling (Appendix C, 16a).

The record discloses that in timely *pre*-conviction proceedings appellants unsuccessfully challenged the constitutionality of N.Y. Judiciary Law § 598 and its absolute class exclusion of all of appellants' peers. (Appendix E, 42a-54a). New York's appellate courts then ruled that that issue could *only* be reviewed in *post*-conviction proceedings (*id.* at 55a-57a, 60a). The record also discloses that the touchstone facts—i.e., that appellants opened the bridges—were never disputed and that the only contested issues were legal issues, including particularly the constitutional issues here presented (Appendix D, 27a-29a and fns. 2-4 thereto).

Hence, once the New York Courts had determined (a) that the challenged penal law provision constitutionally applied and (b) that appellants' grand jury challenge could *only* be reviewed in *post*-conviction proceedings, appellants were constrained to enter pleas, which, upon the record, were coupled with an *explicit preservation* of appellate review rights (Appendix D, 26a-28a and fns. 2-4, 20a, 40a).

Appellants followed the *precise* procedure—a pre-plea motion coupled with a plea specifically preserving appellate review rights—dictated and authorized by the cases[1] and by statute.[2]

The Appellate Division majority approved that procedure and explicitly ruled that, by thus properly proceed-

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[1] *People* v. *Chirieleison,* 3 N.Y.2d 170, 173-74 (1957); *United States* v. *Burke,* 517 F.2d 377, 379 (2d Cir. 1975). *Accord, United States ex rel. Scranton* v. *State of N.Y.,* 532 F.2d 292 (2d Cir. 1976); *People* v. *Blakely,* 34 N.Y.2d 311, 314 (1974); *People* v. *White,* 32 N.Y.2d 393 (1973); *People* v. *Henderson,* 20 N.Y.2d 303 (1967). *See also, Lefkowitz* v. *Newsome,* 420 U.S. 283, fn. 7 at 290-91, 293 (1975); *United States* v. *Zudick,* 523 F.2d 848, 853 (3rd Cir. 1975); *United States* v. *Doyle,* 348 F.2d 715 (2d Cir.), *cert. denied,* 382 U.S. 843 (1965).

[2] N.Y. Criminal Procedure Law § 210.20(2). *See, Langella* v. *Com'r. of Corrections, State of N.Y.,* 413 F. Supp. 1214, 1216-17 (S.D.N.Y.), *aff'd,* 545 F.2d 818 (2d Cir. 1976).

ing, appellants had *not* waived, but instead had *preserved,* their right to appellate review (Appendix D, 19a, 20a, 26a-32a, 40a). The Court of Appeals *affirmed* (Appendix C, 16a). It did not dismiss appellants' appeal as the State misrepresents (*Ibid*).[3]

The only authority cited by the State to support its waiver notion is *Tollett* v. *Henderson,* 411 U.S. 258 (1973) and certain related cases. *Tollett* rebuffed a state prisoner's attempt to use federal *habeas corpus* proceedings to challenge grand jury selection procedures long *after* he had pleaded guilty *without making* timely *pre*-plea objection to grand jury composition. As was held in the Appellate Division (Appendix D, 29a-32a), the *Tollett* rationale clearly has no application to the present case, in which the appellants not only made *timely pre*-plea objection and sought to obtain appellate review thereof *prior* to plea, but also, when that review was denied, pleaded guilty with an explicit preservation of appellate review rights in precise conformity with established state procedure (*supra,* p. 3, fns. 1, 2).

The State has not cited any Supreme Court decision holding that a guilty plea automatically waives *timely* and properly made and preserved objections. Indeed, two recent Supreme Court decisions (both involving New York practice) recognize that a guilty plea is *not* an automatic waiver of properly made and preserved pre-plea objections. *Menna* v. *New York,* 423 U.S. 61 (1975); *Lefkowitz* v. *Newsome, supra,* 420 U.S. 283.

In any event, as this Court recently ruled in *Castaneda* v. *Partida,* —— U.S. ——, 45 L.W. 5302, 4303, fn. 4 (March 22, 1977), where, as here, the State courts have considered

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[3] A majority of the Appellate Division had held that appellants' grand jury challenge based on *conceded sex discrimination practices* had, however, not been sufficiently documented or had been waived (Appendix D, 18a-22a). The Court of Appeals agreed that as to that issue waiver had occurred (Appendix C, 16a). That issue has not been tendered here.

appellants constitutional ". . . claim on its merits . . ., we are free to do so here. *Coleman* v. *Alabama*, 377 U.S. 129 (1964); cf. *Francis* v. *Henderson*, 425 U.S. 536, 542 n. 5 (1976)."[4]

The Appellate Division explicitly ruled that appellants had properly preserved their § 598 grand jury challenge, and the Court then considered the merits of that challenge, sustaining the constitutionality of § 598 and with it appellants' convictions (Appendix D, 18a-22a, 32a-36a, 40a-41a). The State acknowledges that the Court of Appeals *affirmed on the merits* (Appellee Br. 13-14), explicitly rejecting appellants' challenge to § 598 "under the Federal Constitution." (Appendix C, 16a).

Appellants' grand jury challenge thus is properly before this Court. *Castaneda* v. *Partida, supra*. *See, Menna* v. *New York, supra*, 423 U.S. 61.

II.

The Grand Jury Class Exclusion Issues.

A.

Castaneda Compels Summary Reversal

In *Castaneda* this Court recently reiterated the established principle that in grand, like petit, jury selection, the ". . . absolute exclusion of an identifiable group . . . constitutes a constitutional violation . . . ." *Supra*, 45 L.W. at 4305. Indeed, the dissent in *Castaneda* echoed that view, aptly stating the rationale which constitutionally precludes any *absolute class* exclusion of, *as here, all* of a criminal defendant's *peer* group:

> "That individuals are most likely to discriminate in favor of, than against, those who share their own

[4] Indeed, as observed in the Appellate Division, appellants' plea was conditioned upon a right of review (Appendix D, 27a-30a). *See, Henderson* v. *Morgan*, 426 U.S. 637, 648-51 (1976) (concurring opinion).

> favor of, than against, those who share their own identifiable attributes is the premise that underlies the cases recognizing that *the criminal defendant has a personal right under the Fourteenth Amendment not to have members of his class excluded from jury service. Discriminatory exclusion of members of the defendant's class has been viewed as unfairly excluding persons who may be inclined to favor the defendant.* See *Strauder* v. *West Virginia*, 100 U.S. at 309." *Supra*, 45 L.W. at 4311. (Powell, J., dissenting). (Emphasis supplied).[5]

Here personal prejudice is present. *All* of appellants' peers were statutorily and absolutely excluded from service. And the conclusion that the excluded class is identifiable and distinct is compelled by the fact that § 598 singles them out for different treatment. An identifiable, and hence cognizable, class ". . . is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied." *Castaneda* v. *Partida, supra*, 45 L.W. at 4305.[6] Since, as we show below, there was no justification whatsoever for the absolute exclusion thus decreed (*infra*, pp. 6-11), reversal must follow. See, *Carter* v. *Jury Commission of Greene County*, 396

[5] Among the questions apparently left open or, at least, beclouded, by the opinions in *Castaneda* and which, we submit, merit prompt clarification is whether this Court has now rejected the broad principles of standing, articulated in *Peters* v. *Kiff*, 407 U.S. 493, 502-504 (1972) and reiterated in *Taylor* v. *Louisiana*, 419 U.S. 522, 526 (1975), that personal prejudice need not be shown to support a challenge to improper jury composition. The dissent in *Castaneda* seems to reject that view. The majority did not respond to or clarify the point. As members of the excluded class, appellants, in any event, are prejudiced and have standing.

[6] See, *Hoyt* v. *Florida*, 368 U.S. 57, 59-60 (1961), quoting from *Hernandez* v. *Texas*, 347 U.S. 475, 478 (1954). See also, *Taylor* v. *Louisiana, supra*, 419 U.S. at 530, 532 fn. 12. Having statutorily singled out this class for different treatment, it is absurd for the State to contend that that class is not identifiable or cognizable. Compare, *Castaneda* v. *Partida, supra*, 45 L.W. at 4305 with Appellee Br. 18.

U.S. 320, 330 (1970); *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 223-24 (1946).

Moreover, the effect of the challenged statutory exclusion was not merely to exclude *all* of appellants' peers, but also to wholly exclude substantially in excess of *11%* of the otherwise qualified jury population and in excess of *18%* of the $6,000 to $19,999 peer group of middle income wage earners.[7] Thus the absolute peer exclusion here present simultaneously creates economic discrimination of precisely the kind abjured by this Court in *Thiel* v. *Southern Pacific Co., supra,* 328 U.S. 217.[8]

B.

The State's Defense of § 598 Lacks Merit

The premise which underlies the State's defense of New Yory's statutory exclusion of *all* of appellants' *peers* from *all* grand jury service is that such absolute exclusion is rationally founded.

The State argues that § 598 *rationally presumes* that *all* Federal, State, Local and other employees who receive in excess of $1000 from any governmental or quasi-governmental source are, *as a class,* biased or potentially too

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[7] *Compare, General Population Characteristics,* New York, U.S. Bureau of Census, Table 20 (Nov. 1971) with *Public Employment in 1972,* U.S. Bureau of Census, Tables 5-7 (Aug. 1973); *General Social and Economic Characteristics,* U.S. Summary, 1970 Census, Wash., D.C., June 1972, Table 84; *Government Workers, Subject Reports,* 1970 Census of Population, PC (2-7D, U.S. Bureau of the Census, Wash., D.C., June 1973, Table 9. These statistics, however, do *not* include quasi-public employees, part time, substitute or seasonal governmental employees, or volunteers in public service, *all* of whom are excluded by § 598 (See, 1942 N.Y. Attorney Gen'ls. Rep. 383; 1960 N.Y. Attorney Gen'ls. Rep. 181).

[8] In *Castaneda,* the majority explictly left open for resolution the question as to whether a showing of "simple economic discrimination"—even where such showing was *not, as it is here,* coupled with absolute peer exclusion—suffice *of itself* to abridge Fourteenth Amendment protections. *Supra,* 45 L.W. at 4305 n. 11. This case presents the appropriate vehicle for resolution of that issue.

timid to render honest service as grand jurors (Appellee Br. 16-17). The State, however, omits to explain the basis for its conclusive statutory presumption of class bias, *e.g.,* what bias a *Federal* postal clerk (or for that matter a State or City College professor) can *intrinsically* have either for or against one accused of rape or burglary. The State likewise omits to explain how, if class bias is to be rationally presumed based solely on the receipt of $1000 from a governmental or quasi-governmental source, such conclusive presumption rationally attaches *only* to grand jury service and evaporates when it comes to petit jury service, which that self-same class is *mandated* to render.[9]

Specifically referring to jury service by governmental employees, this Court has ruled that such presumptive bias notions are "without any rational foundation" and constitute a "serious reproach" to the administration of justice. *United States* v. *Wood,* 299 U.S. 123, 149-151 (1936). *Accord, Dennis* v. *United States,* 339 U.S. 162 (1950); *Frazier* v. *United States,* 335 U.S. 497 (1948).

Rationality is not a catchword to be invoked at will to cloak or excuse governmental excess; it is a reasoned, logical process. "Vague conjecture does not convince that Governmental employees are so intimidated that they cringe before their Government in fear of investigation and loss of employment if they do their duty as jurors . . ." *Dennis* v. *United States, supra,* 339 U.S. at 172. "We think that the imputation of bias simply by virtue of governmental employment, without regard to actual partiality growing out of the nature and circumstances of particularized cases, rests on an assumption without any rational foundation." *United States* v. *Wood, supra,* 299 U.S. at 149.

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[9] Obviously, if bias could rationally be conclusively presumed as disqualifying all public employees from all grand jury service then, *perforce,* such persons should as a class be disqualified from all petit jury service, as is, for example, the case with judges. N.Y. Judiciary Law § 598(4); see *id.* at § 599.

Indeed, because of their familiarity with governmental operations and concerns, and their resultant exposure to a range of human experiences not shared by others, the exclusion of public and quasi-public employees takes on an invidious aspect. To quote Justice Marshall, the result of their deliberate exclusion ". . . is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable", thereby depriving the jury ". . . of a perspective on human events that may have unsuspected importance in any case that may be presented." *Peters* v. *Kiff, supra,* 407 U.S. at 504, quoted with approval in *Taylor* v. *Louisiana, supra,* 419 U.S. at 532, fn. 12.[10]

It remains only to note that a rational basis for § 598 is not furnished by the State's contention that, because *some* grand juries are *occasionally* assigned investigative functions (*e.g.,* official corruption inquiries), as contrasted with their normal role of determining whether or not to indict in specific cases, public employees as a class can be excluded from *all* grand jury service. If, as the legislative history of § 598 indicates (see, Appellee Br. 14-15), the sole purpose of that statute was to exclude certain public employees from occasional grand jury inquiries involving official corruption, then the exclusion readily can and must be limited to such instances, else the statute is constitu-

[10] As observed in *Taylor* (*supra,* 419 U.S. at 527-532), the above-quoted reasoning in *Peters* supports the historic conclusion that the "exclusion" of any identifiable and distinct group violates the constitutionally guaranteed fair cross-sectional jury requirement. See, *Peters* v. *Kiff, supra,* 407 U.S. 493; *Alexander* v. *Louisiana,* 405 U.S. 625 (1972); *Brown* v. *Allen,* 344 U.S. 443, 447 (1953); *Pierre* v. *Louisiana,* 306 U.S. 354, 358, 362 (1939). Yet, in *Castaneda* the dissent concluded that the cross-sectional requirement does not extend to State grand juries (*supra,* 45 L.W. at 4309), though cases like *Peters, Alexander, Brown* and *Pierre,* to name just a few, had held otherwise. The majority in *Castaneda* did not respond or comment.

tionally infirm. See, *Quadra* v. *Superior Ct. of City and Cty. of San Francisco,* 403 F. Supp. 486, 490-493 (N.D. Calif. 1975).

More importantly, New York statutorily provides for *individualized grand jury* disqualification or excuse on a case-by-case, inquiry-by-inquiry, basis for the same reason a petit juror may be disqualified or excused. E.g., N.Y. Criminal Procedure Law § 190.20(2); N.Y. Judiciary §§ 593(1), 609(4); Rules, N.Y. App. Div., 1st Dept. § 620.24.[11] Such an *individualized* approach to disqualification is essential for "[j]ury competence is an individual rather than a group or class matter." *Thiel* v. *Southern Pacific Co., supra,* 328 at 220. *Accord, Taylor* v. *Louisiana, supra,* 417 U.S. at 534. And it is no answer for the State to assert (Appellee Br. 19) that administrative convenience excuses the vast sweep of the absolute exclusion statutorily decreed, particularly if, as the State now contends (*Id.* at 14-15), its arguably legitimate purpose is far more circumscribed. *Taylor* v. *Louisiana, supra,* 419 U.S. at 534-35. *See also, Cleveland Board of Education* v. *LeFleur,* 414 U.S. 632 (1974); *Vlandis* v. *Kline,* 412 U.S. 441 (1973); *Stanley* v. *Illinois,* 405 U.S. 645 (1972).[12]

The foregoing response to the State's rational basis defense of § 598 assumes that rational basis is the governing standard. Appellants maintain that, while § 598 does not

[11] "The Court may excuse a grand juror or may discharge any person from serving as a grand juror in the same cases in which a trial juror may by law be discharged or excused." Rules, N.Y. App. Div. 1st Dept. § 620.24.

[12] The State seemingly *agrees* that § 598 can *not* be defended based on the essentiality of the "particular occupations" engaged in by all Federal, State, Local and other public employees (ranging from porters to clerks). Were the entire class critical or essential the State would not have concluded that, with specific exceptions (*e.g.,* policemen and firemen), these *self-same* public employees are *all* required to render petit jury service. See, *Labat* v. *Bennett,* 365 F.2d 698 (5th Cir. 1966), *cert. denied,* 386 U.S. 991 (1967).

survive even rational basis scrutiny, a stricter standard applies. We argue that once standing and related threshold requirements (e.g., the exclusion of an identified or identifiable class) have, as here, been met, then strict scrutiny is required and the State must show that the exclusion serves some compelling State interest.

In *Taylor* v. *Louisiana, supra,* 419 U.S. at 534, this Court recently concluded, in a petit jury context, that "[t]he right to a proper jury cannot be overcome on merely rational grounds"—"weightier reasons" must then be shown to support the exclusion. *Taylor,* following with approval *Peters* v. *Kiff*—a grand jury case—, recognized the standing of a criminal defendant to challenge the exclusion of groups of which he is not a member. See, *supra,* p. 5, fn. 5. In *Castaneda,* the dissent maintained that the constitutional protections accorded in grand jury contexts are different from and more strict than those applied to petit jury selection, as applied in *Taylor. Supra,* 45 L.W. 4309-10. That view seemingly was not shared by the *Castaneda* majority. *Supra,* 45 L.W. at 4305, fns. 12-13, 4307. In any event, we here suggest that regardless of the strictness of standing and related threshold criteria that must be met, once the defendant has shown that he has been prejudiced by the exclusion of an identifiable group—here, *all* of his peers—, the State assumes the burden affirmatively to support the challenged exclusion and the State's proffered rationale must be strictly scrutinized. Any other rule would fail to give adequate protection to the right of a criminal defendant to indictment by an *impartial* jury, a right which automatically attaches once the State opts to use the grand jury system.

Appellants' view accords with numerous holdings of this Court, reached in a grand jury context.[13] ". . . [I]f a state

[13] E.g., *Peters* v. *Kiff, supra,* 407 U.S. 493; *Alexander* v. *Louisiana, supra,* 405 U.S. 625, 635-37; *Carter* v. *Jury Commission of Greene County, supra,* 396 U.S. at 330; *Pierre* v. *Louisiana, supra,* 306 U.S. 358, 362.

chooses, quite apart from [federal] constitutional compulsion, to use a grand or petit jury, due process [as well as equal protection] imposes limitations on the composition of that jury." *Peters* v. *Kiff, supra,* 407 U.S. at 501.[14] It then follows, as this Court held decades ago in *Pierre* (*supra,* 306 U.S. at 358), that because "[i]ndictment by Grand Jury and trial by jury cease to harmonize with traditional concepts of justice at the very moment particular groups, classes or races . . . are excluded from jury service", the State must show that a compelling interest supports such exclusion. Here, no such showing is even attempted.

III.

The Commerce Clause—Supremacy Issues.

The State's response to appellants' Commerce Clause—Federal Supremacy Doctrine argument misses the mark. We do not contend that upon their face the State penal statutes (N.Y. Penal Law §§ 145.20, 195.05) conflict with Federal law. The State penal statutes govern a variety of wrongs, most of them having nothing at all to do with bridges over navigable waterways. Our quarrel is with the State penal statutes *as applied.*

The State had determined *not* to invoke the Taylor anti-strike law (N.Y. Civil Service Law § 200 *et seq.*) to enjoin appellants' job action, which would leave the bridges unattended. Appellants, thus freed to proceed with their demonstration, were, however, cautioned that Federal law and regulation (33 U.S.C. § 499, 33 C.F.R. 117) *mandated* that the draws of the bridges not be permitted to obstruct free passage of watercraft. To comply with that mandate, before leaving their posts, appellants opened the draws of only those bridges spanning navigable waterways. They were indicted for that and nothing else.

[14] See, e.g., *supra,* fn. 13.

The conflict is apparent. As applied herein and as interpreted by the State Courts (as a matter of first impression), the State penal strictures made opening of the bridges a crime (Appendix F, 75a-77a, 81a). Under Federal law, failure to do so was a crime.

Where State legislation conflicts, by its terms *or as applied,* with Federal law or regulation, particularly in the area of navigation or trade, the State law must give; and that is especially true here, since the instant Federal statute was expressly enacted to ensure precisely that result with respect to drawbridges over navigable waterways. See, Jurisdictional Statement, 18-19.

Conclusion

For each of the foregoing reasons, probable jurisdiction should be noted.

Respectfully submitted,

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